(5)

No. 91-1524

Supreme Court, U.S.
FILED
APR 14 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1991

CONSOLIDATED RAIL CORPORATION,
Petitioner,

vs.

FRANK J. ESCHBERGER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

NIXON, HARGRAVE, DEVANS & DOYLE
SUSAN C. RONEY
LAURIE STYKA BLOOM
1600 Empire Tower
Buffalo, New York 14202
(716) 853-8100

RICHARD F. GRIFFIN
Counsel of Record
PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER
Suite 3400
One Marine Midland Center
Buffalo, New York 14203
(716) 847-8400

PEPPER, HAMILTON & SCHEETZ
GERALD P. NORTON, ESQ.
1300 Nineteenth Street, N.W.
Washington, D.C. 20036-1685
(202) 828-1200

Attorneys for Petitioner Consolidated Rail Corporation

April 10, 1992

Batavia Times Publishing Co.
Batavia, N.Y. (716) 344-2000

TABLE OF CONTENTS.

	Page
Petitioner's Reply Brief	1
Conclusion	5
Appendix to Petitioner's Reply Brief:	
Excerpts of Testimony of John Wood	A1
Excerpt of Testimony of Michael Herr	A2
Excerpt of Testimony of Gerald Gates	A3
Excerpts of Testimony of Frank Eschberger	A3

TABLE OF AUTHORITIES.

Fiske v. Kansas, 274 U.S. 380 (1927)	4
Maldonado v. Missouri Pac. Ry., 798 F.2d 764 (5th Cir. 1986), *cert. denied*, 480 U.S. 932 (1987)	1,2
Railroad Revenue Adequacy—1990 Determination, 8 I.C.C.2d 1 (1991)	2
Reed v. Philadelphia & N. Eng. R.R., 934 F.2d 128 (3d Cir. 1991)	1,2
United States v. Johnston, 268 U.S. 220 (1925)	4
United Transp. Union v. Lewis, 711 F.2d 233 (D.C. Cir. 1983)	2

STATUTE.

Safety Appliance Act:	
45 U.S.C. §2	1

IN THE

Supreme Court of the United States

October Term, 1991

No. 91-1524

CONSOLIDATED RAIL CORPORATION,
Petitioner,

vs.

FRANK J. ESCHBERGER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

Respondent does not dispute that there is a conflict between the state court decision below and the decisions of federal courts of appeals in *Maldonado*[1] and *Reed*[2] concerning the proper interpretation of the federal Safety Appliance Act, 45 U.S.C. §2, and that the lower courts

[1] *Maldonado v. Missouri Pac. Ry.*, 798 F.2d 764 (5th Cir. 1986), *cert. denied*, 480 U.S. 932 (1987).

[2] *Reed v. Philadelphia & N. Eng. R.R.*, 934 F.2d 128 (3d Cir. 1991).

have called upon this Court to resolve that conflict (Opp. at 11, 12; Pet. at 21).[3] Indeed, respondent concedes that there is a need to reconcile the subsequent judicial decisions with the D.C. Circuit's decision in *Lewis*,[4] deferring to and upholding the responsible federal agency's interpretation of the Act (Opp. at 12).

Respondent also does not dispute that the question presented is important. Thus, respondent does not dispute that the question concerns possible liability for a situation arising numerous times every day on all of the Nation's freight railroads which, like Conrail, have switching yards in several states and federal circuits. Nor does respondent dispute that the conflicting decisions and resulting uncertainty about the proper interpretation will result in imposing substantial liabilities on the already financially strapped railroads[5] or may cause them to undertake costly retrofitting of existing rail cars (Opp. at 14), neither of which Congress intended.

---

[3]Respondent notes that the Court has denied certiorari in four prior cases where the lower court decision addressed the "misaligned drawbar" defense (Opp. at 13), but three of these petitions were filed before the present conflict had developed, and the fourth (*Maldonado*) was the first decision to sustain that defense. After further percolation of the issue in the federal and state courts, it is now clear that the Fifth Circuit's decision in *Maldonado* was not "aberration[al]" (Opp. at 12), having been followed by the Third Circuit's considered decision in *Reed*, but that the state courts are continuing to take a conflicting position, as here. Respondent's reliance on a footnote in *Lewis* is misplaced (Opp. at 12-13), for there the Court of Appeals was merely describing the case law to date, prior to the contrary decisions in *Maldonado* and *Reed*.

[4] *United Transp. Union v. Lewis*, 711 F.2d 233 (D.C. Cir. 1983).

[5] See *Railroad Revenue Adequacy—1990 Determination*, 8 I.C.C.2d 1 (1991) (only one major railroad is earning adequate net revenue).

Beyond arguing that the decision below was correct,[6] respondent's only ground for opposing certiorari is the contention that "any pronouncement this Court might make" would necessarily have no effect on the outcome and hence would be an "advisory opinion" (Opp. at 4, 6-7). Respondent is mistaken.

Respondent's contention is based on the premise that this Court may not review the dicta of the courts below that Conrail had failed to elicit evidence that the drawbar was misaligned before the attempted coupling or that any such misalignment was not caused by an equipment defect (*id.* at 7). However, there was indisputably sufficient evidence on both points (*See* Pet. at 16 n.16),[7] and the proper question for this Court is

[6] As to its correctness on the merits, respondent does not dispute that, under the decision below, liability is established any time a worker must penetrate the airspace behind one car, no matter how far up the track there is a second car, and even if that second car's proximity has nothing whatever to do with the worker's injury. Respondent has not shown how such an attenuated, theoretical basis for liability can be read into a statute intended to prevent railroad workers from being crushed between two adjacent moving cars (*see* Pet. 11-12; Amicus Br. 7-10).

[7] Although, as is often the case, no one saw the drawbars before the attempted coupling, respondent testified that, after the attempt, at least one of the coupler's knuckles was open and ready for coupling (R. 685-86; A3-A4). Moreover, respondent's witnesses, including his "railroad expert" and a Conrail Trainmaster, testified that the attempted coupling had occurred on a curve that had tended to result in misaligned drawbars (R. 371, 380, 415, 1585; A1-A2; *see also* R. 2152; A3).

Similarly, respondent testified that he was capable of determining whether a drawbar was defective and that he found no defect in the car (R. 1053-54; A6-A7). He also testified that he neither felt nor saw any "burr" or "spurs" on the couplers in question (R. 1065; A. A7), and that he did not make any report of a defective car as a whole or any part thereof, as he was required to do if he thought the drawbar was defective (R. 1053-54; A6-A7). Indeed, respondent continued his normal work, including coupling cars, after he aligned the drawbar (R. 738-39, 1065-1066; A4, A7-A8).

(Footnote continued on following page.)

what kind of showing must be made to trigger the misaligned drawbar defense. That is a question of federal law fairly encompassed by the principal question presented, which this Court could address itself or could direct the state court to consider on remand, once the existence and nature of the defense are confirmed. *See e.g., Fiske v. Kansas*, 274 U.S. 380, 385-86 (1927) (this Court may review state court findings where a Federal right has been denied as a result of an unsupported finding "or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts").

In short, the petition does not ask this Court "to review evidence and discuss specific facts" under an established federal legal standard applied by a federal court, as in *United States v. Johnston*, 268 U.S. 220, 227 (1925), on which respondent relies (Opp. at 4). Rather, the petition calls upon the Court to determine whether the state court applied the correct federal law standard.

(Footnote continued from preceding page.)

The fact that the drawbar was jammed to one side after the attempted coupling (Opp. at 6) does not mean that it was jammed before, rather than as a result of, that attempt. That the coupling was not defective was further evidenced by the fact that, once respondent aligned the drawbar, the cars coupled automatically (R. 994-95; A5). Further, he was able to align the drawbar and effect the coupling entirely on his own without the help that was available to him if it had been needed (R. 1050; A5-A6).

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

NIXON, HARGRAVE,
DEVANS & DOYLE
SUSAN C. RONEY
LAURIE STYKA BLOOM
1600 Empire Tower
Buffalo, New York 14202
(716) 853-8100

RICHARD F. GRIFFIN
Counsel of Record
PHILLIPS, LYTLE, HITCHCOCK,
BLAINE & HUBER
Suite 3400
One Marine Midland Center
Buffalo, New York 14203
(716) 847-8400

PEPPER, HAMILTON
& SCHEETZ
GERALD P. NORTON, ESQ.
1300 Nineteenth Street, N.W.
Washington, D.C. 20036-1685
(202) 828-1200

Attorneys for Petitioner
Consolidated Rail Corporation

April 10, 1992

APPENDIX TO PETITIONER'S REPLY BRIEF

[R. 371] [201] TESTIMONY OF JOHN WOOD

* * *

Q. All right. And Mr. Wood, would you tell the jury what effect these curves were having on the couplers—on these couplers of these cars that were supposed to be automatic couplers? What effect was those curves having?

A. Well, if a car was to, what we refer to as hangup on the curve, that is after it came off the hump, and prior to getting on the straight piece of track in the classification track, the drawheads and the couplers on a railroad car are lined up, are built into the end of the car center with—with that car on both ends. A car coming down around a curve and stopping on that curve, some of these cars are—are rather long in length, some are up to ninety feet in length, if that car stops on a curve, the—the drawhead that's sticking out from the end of the car will be—will tend to be handing more towards the outside part of that curve. . . .

* * *

[R. 380] [210] * * *

BY MR. BELTZ:

Q. Mr. Wood, this problem with regard—with regard to the—the couplers not coupling, especially involving cars that—well, strike that. The problem that you—that the railroad had there with—with cars not coupling on the curves, that had been going on for a number of years, is that not true?

A. That's true.

* * *

[R. 415] [245] * * *

Q. And they knew that when—they knew when these—when these cars were coming around the curves, that a lot of these cars, the curve was affecting the—the—whether the couplers were directly in line, or whether they were askewed, is that not true, or slewed, if you want to use that word?

A. If a car was coming around a curve, that's correct.

* * *

[R. 1585] [1396] **TESTIMONY OF MICHAEL HERR**

Q. But if I—I understand. So there is curvature from the point—between the point of the hump and the west end of track sixty-one, is that right?

A. Yeah, but the curve is—the curve is on the east end of track sixty-one.

Q. Yes.

A. And then sixty-one straightens out and it goes straight to the west end.

Q. Right. Okay. And Mr. Herr, in this area of the curvature, can you tell us what, if any, effect that was having upon the drawbars on various vehicles—various cars going in that area?

* * *

THE WITNESS: If a car stops on this curve, the drawbar would be off-center from the—because of the curve, and a following car coming down would not couple to this standing car, it would bypass the coupler and would cause the couplers to be knocked off-center or—or slewed. There'a s slang word to it, slewed, would knock them off-center.

* * *

[R. 2152] [1955] TESTIMONY OF GERALD GATES

Q. Now, on a car that has as its destination to go down into track sixty-one, would you illustrate the configuration of the track that—how it would proceed? In a general—from the—once it goes by the retarders, then down into the track.

A. As the car comes over the master, it will hit the first set of divide switches, which separate the classification yard into three major groups, you've got group six and seven, three, four, and five, and one and two, that the car would be routed this route. It would continue down this route, which would lead into group seven, through a series of switches up into track sixty-one.

Q. And would it—and then—would it go around a curve as it would enter into track sixty-one?

A. Yes. It would continue around the curve here on track sixty-one, and back into the tangent part of the yard.

* * *

[R. 685] [509] TESTIMONY OF FRANK ESCHBERGER

* * *

Q. And then if the drawbar—if the drawbar is centered, and you have the—the opposite drawhead working with it in proper alignment, what is the effect of that?

A. Well, it's a coupling effect. It would be just like this, two knuckles—I did open the other knuckle for—simply because when you use two open knuckles, it's easier and more sure of making a coupling, so as I said, I had that open, now I centered this, and I brought the engine—well, at that time I didn't because of this car

[R. 686] [510] rolling free, I knew there was a problem on the other end, but I don't want to get ahead of myself. When I finally did bring the engine ahead, he shoved the cars that we had ahold of, being this side, he shoved them. When the drawheads come together, the knuckles closed, and of course, the pins dropped and the coupling was made.

Q. So it coupled automatically, is that right?

A. Yes.

Q. All right. And was the purpose of you going in to move this, the slewed drawhead, is to center it so that those—so the couplers could couple automatically?

A. Yes.

* * *

[R. 738] [562] * * *

Q. Now Mr.—Mr. Eschberger, after you've completed the coupling on the—on the east—on the east end of the lumber car, would you tell us what you did after that, sir?

A. Well, I went up the rest of the track to make sure it was all coupled. Sometimes you don't go to the complete extreme of the track, you can look up and see if the cars are moving, coming along, and know that the track is coupled.

[R. 739] [563] Q. Okay. And then, Mr. Eschberger, what did you do then, sir?

A. I believe then I—that's a long time ago, but the best of my recollection, I coupled the rest of sixty-two.

Q. And you recall what was involved there?

A. Well, the—the same thing, coupling track, and—

Q. But what I'm trying to find out, Mr. Eschberger, was there—did you—do you know whether you had to couple any cars, actually couple any cars, rather than just go along and see whether they were coupled?

A. On sixty-two?

Q. Right.

A. Yes, I believe I made a few couplings. I don't know, maybe three. I don't know for sure.

* * *

[R. 994] [815] * * *

CROSS EXAMINATION
BY MR. GRIFFIN:

Q. Mr. Eschberger, on the morning of the claimed accident, at the time that you were working, you—you say you moved and centered, aligned a drawbar on each end of this lumber car, is that correct?

A. Correct.

Q. And then when you got it in the center, then you coupled—then you coupled onto that lumber car, is that correct?

A. Correct.

[R. 995] [816] Q. And that coupling worked automatically after you had aligned and centered the drawbar, correct?

A. Yes, it did.

Q. All right. And when you said that it was a—and as you were centering this—centering or aligning the drawbar is something that you've done hundreds and thousands of times in your thirty years of railroading, correct?

A. Yes.

* * *

[R. 1050] [869] * * *

Q. All right. So if you needed any help, for example, from a car repairmen to come over to help you, or you and the conductor, center a drawhead, they would be available over in the car shop, is that correct?

A. Yes.

Q. All right.

A. Well, other places, too. Not just in the car shop.

Q. I understand that. I understand. So—okay. And you did not call for help from the conductor, or help from the—from the car department at all on August 6th, 1983 in connection with any drawhead, right?

A. No, I didn't.

Q. And that's because you didn't need any such help, correct?

A. No, I didn't.

Q. You didn't need help, okay?

A. No.

Q. If you had needed it, it was available, correct?

A. And I would have called for it.

* * *

[R. 1053] [872] * * *

Q. There are various parts of a railroad car that are referred to as safety appliances, is that correct, Mr. Eschberger?

A. Yes.

Q. In your experience? For example, the —the ladders and handholds on a car is referred to as a safety appliance, correct?

A. Yes.

Q. And the handbrake is referred to as a safety appliance isn't it?

A. Yes.

Q. And the coupling device, the drawbar, the knuckle and so on, is referred to as a safety appliance, correct?

A. Yes.

* * *

[R. 1054] [873] MR. GRIFFIN: Let me approach it this way, Mr. Eschberger, did you report any mechanical defect on this lumber car that you have described on August 6th, 1983?

* * *

THE WITNESS: Did I report any defect?
MR. GRIFFIN: Yes.
THE WITNESS: No.
MR. GRIFFIN: And is that because you found no mechanical defect in the car, correct?
THE WITNESS: Correct.

* * *

[R. 1065] [884] * * *

Q. Now, you didn't feel in and feel any—any burr, did you, on any part of the railroad cars?

A. No.

Q. And you didn't see any such burr at any time, did you?

A. No.

Q. You were the only person who was present down there at track sixty-one when you say you felt a muscle pull, is that correct?

A. That's correct.

Q. And you didn't call at that time to your conductor and say, I had a hard one, or I pulled a muscle, or anything like that, correct?

A. No.

Q. Is it—it is true, isn't it, that the first time that you noticed any numbness, or experienced any numbness in your right hand was when you were back at the "Y" later on, after you had completed your work on track sixty-one, is that correct?

A. That's correct.

Q. All right. And prior to that time, you had worked with various cars on track sixty-one and on track sixty-two, is that correct?

[R. 1066] [885] A. Yes, that's correct.

Q. And you don't know how many different drawbars you moved during the course of that work on sixty-one and sixty-two, do you?

A. No. I can't remember.

* * *